STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B054

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EUGENE R. GOMEZ,

Complainant,

VS.

DEPARTMENT OF HIGHER EDUCATION, AURARIA HIGHER EDUCATION CENTER, DIVISION OF FACILITIES MANAGEMENT,

Respondent.

The hearing in this matter was held on April 15, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Laurence Pendleton, assistant attorney general. Complainant, Eugene R. Gomez, was present at the hearing and represented by Joe L. Martinez, attorney at law.

Respondent called the following employees of the Auraria Higher Education Center (AHEC), Department of Higher Education, to testify at hearing: Craig Bisgard; Simeon Rivera; and Maggie McConaghie. Respondent's exhibits 1 through 4, 8, and 15 through 17 were admitted into evidence without objection. Respondent's exhibits 6, 7, and 13 were admitted into evidence over objection.

Complainant testified in his own behalf and called Janet Gomez, his spouse, to testify at hearing. Complainant's exhibits A, B, and I were admitted into evidence without objection. Complainant offered respondent's exhibit 12 into evidence. It was admitted without objection. Complainant's exhibit J was admitted into evidence over objection.

MATTER APPEALED

Complainant appeals his termination from employment.

ISSUES

- 1. Whether complainant engaged in the acts for which discipline was imposed.
- 2. Whether the conduct proven to have occurred constitutes

violation of State Personnel Board Rules.

3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

- 1. Complainant, Eugene Gomez (Gomez), was employed by AHEC as a grounds keeper for approximately 20 years. On October 31, 1996, Gomez' employment was terminated for failure to comply with standards of efficient service and competence and failure or inability to perform job duties.
- 2. As a grounds keeper, Gomez was responsible for performing maintenance work, landscaping, and trash pick up on the AHEC grounds. Gomez was supervised by Simeon Rivera and the appointing authority for his position was Craig Bisgard.
- 3. AHEC policies on leave usage required employees on the grounds crew to notify their supervisor directly anytime the employee plans to be off work due to illness. AHEC policy further requires a grounds keeper to give five days notice whenever requesting annual leave for a period greater than one day. Gomez was aware of these policies.
- 4. From June to October, 1996, Gomez was repeatedly absent from work, failed to properly report his absences from work, took annual leave without prior approval, took sick leave when he did not have sick leave accrued, and frequently contacted his employer to advise him that he would appear for work late and then he failed to appear.
- 5. In July, 1996, Gomez was absent for all or part of work on nine days. He took 14.72 hours of leave without pay.
- 6. In August, 1996, Gomez failed to appear for work on eight scheduled work days. Gomez failed to appear for work, failed to contact his supervisor about his absence from work, or had his wife contact his supervisor on the following dates:
 - A. On August 5, Gomez' wife contacted his supervisor to advise him that Gomez would be late for work. Later the same day, Gomez' wife contacted his supervisor to advised him that Gomez would not appear for work at all because he had a problem with his son.

- B. On August 8, Gomez' wife contacted his supervisor to advise him that Gomez would be late for work because his alarm clock did not go off. Gomez did not appear for work and did not contact his supervisor to advise him of his absence.
- C. On August 9, Gomez contacted his supervisor at 7:13 a.m. to advise him that he was on his way to work. At 12:02 p.m., when he had not appeared for work, he left a message for his supervisor that he would not be coming to work that day and he would explain further the next work day.
- D. On August 13, Gomez left a message for his supervisor that he would be late for work. He called back later the same morning and left a message that he would not come to work that day.
- E. On August 20, Gomez' wife contacted his supervisor to advise him that Gomez would be late for work because his alarm did not go off. Later that same day, his wife called back to advise Gomez' supervisor that Gomez would not appear for work because he was sick.
- F. On August 27, Gomez contacted his supervisor to advise him that he would be late for work. He did not appear for work this day.
- G. On August 28, Gomez left a message for his supervisor that he was taking a vacation day.
- H. On August 29, Gomez did not appear for work and did not contact his supervisor.
- 7. In September, 1996, Gomez failed to appear for work on thirteen scheduled work days. He took the following action with regard to his employment during this month:
 - A. On September 9, Gomez' wife contacted his supervisor to advise him that Gomez would not appear for work due to illness.
 - B. On September 10, Gomez' wife contacted his supervisor to advise him that Gomez would be late for work. Gomez did not appear for work and did not call.
 - C. On September 11, Gomez was late for work.

- D. On September 16, Gomez failed to appear for work and failed to contact his supervisor to advise him of his absence.
- E. On the September 17, Gomez' spouse contacted his supervisor to advise that Gomez would not appear for work. Then, Gomez failed to appear for work at all that day.
- F. On September 18, Gomez did not appear for work and his wife left a message that he was sick.
- G. On September 19, Gomez did not appear for work and did not contact his supervisor.
- H. On September 20, Gomez' wife contacted his supervisor to advise him that Gomez would not be at work due to illness.
- I. On September 23, Gomez contacted his supervisor at 8:36 a.m. to advise him that his car broke down.
- J. On September 25 and 26, Gomez did not appear for work and did not contact his supervisor.
- 8. From October 1 through 16, 1996, Gomez was absent from work six days. He took the following action with regard to his employment during this month:
 - A. On October 1, Gomez appeared for work late. He did not call his supervisor to advise him that he would be late for work. Gomez was first seen by his supervisor on this date at 1:30 p.m. when he appeared in the grounds keeper shop.
 - B. On October 4, Gomez left a message for his supervisor that he had to attend a funeral. Gomez did not appear for work. Gomez was asked to provide proof that he attended a funeral. Gomez was not able to provide proof of his attendance at a funeral. Gomez provided Simeon Rivera with a leaflet from a funeral home, but when that funeral home was contacted to verify that a funeral was held on October 4, Simeon Rivera was advised that there were no funeral held on October 4.
 - C. On October 11, 14, and 15, 1996, Gomez' wife contacted his supervisor to advise him that Gomez was sick and would not appear for work. On each of these

- dates Gomez' wife did not contact his supervisor until long after the start of the shift.
- D. On October 16, 1996, Gomez did not appear for work and did not contact his supervisor.
- 9. Simeon Rivera (Rivera), Gomez' immediate supervisor, advised Craig Bisgard (Bisgard), the appointing authority, of Gomez' conduct. Bisgard was advised of Gomez' failure to appear for work, failure to comply with AHEC reporting requirements and of Rivera's efforts to supervise him during the period from July to October, 1996.
- 10. On October 1, 1996, Bisgard gave Gomez notice that he received information that might indicate the need to take disciplinary action. By memorandum, Bisgard advised Gomez that he would meet with him on October 4, 1996, to provide him an opportunity to respond to the allegations of misconduct with regard to his failure to appear for work and to comply with AHEC reporting procedures. Gomez failed to appear for the October 4 meeting and did not contact Bisgard to advise him that he would not attend the meeting.
- 11. On October 7, 1996, Gomez delivered a letter addressed to Bisgard to Bisgard's supervisor. The letter was dated October 3, 1997, but Bisgard did not receive the letter from his supervisor until October 10, 1996. The letter advised Bisgard that Gomez was absent a lot because he was having trouble with one of his children who was suicidal.
- 12. On October 10, 1996, Bisgard wrote to Gomez advising him that he waived his right to meet for a Board Rule, R8-3-3 meeting because he failed to appear for the October 4 meeting, failed to apprise Bisgard of his whereabout, and was not on preapproved leave. Bisgard acknowledged receipt of Gomez' October 3 letter. Bisgard advised Gomez that he would conduct an investigation into the allegations of misconduct, that he would take into consideration the information contained in the October 3 letter, and that he would advise Gomez of the results of the investigation.
- 13. Bisgard spoke with Rivera and Gomez' former supervisor, Tom Moody, to gather additional information about Gomez' job performance and employment history. Bisgard also reviewed Gomez' personnel file. Bisgard learned during his investigation that Gomez had problems with attendance during his employment at AHEC. Tom Moody and Rivera had discussed with Gomez the need to improve his attendance. Bisgard reviewed several performance documentation written to Gomez by his supervisor in 1995 in which Gomez was

directed to improve his attendance and punctuality.

- 14. Bisgard also considered the fact that Simeon Rivera informed him that Gomez' abusive leave practices caused morale problems for the other employees on the grounds crew. Employees were disgruntled because Gomez was permitted to abuse leave. The employees also suffered from low morale because they were required to perform Gomez' job duties during his frequent absences.
- 15. Bisgard also reviewed a September, 1995, corrective action Gomez received for abuse of leave. Bisgard also took into consideration a November, 1995, disciplinary action imposed for abuse of leave. Bisgard imposed a one step reduction in pay for a six month period.
- 16. Bisgard considered the fact that the November, 1995, disciplinary demotion failed to result in a permanent improvement in Gomez' job performance. He noted that Gomez improved his attendance and leave practices during the six month period during which the discipline was in effect. However, following the disciplinary action Gomez returned to his old habits abusing leave privileges.
- 17. Bisgard also considered the fact that in August, 1996, Gomez advised Bisgard that he was having personal problems. Bisgard encouraged Gomez at that time to seek assistance from the Colorado State Employees' Assistance Program. Bisgard received no information following their August, 1996, conversation that Gomez sought assistance with his problems. Bisgard did not receive any additional information from Gomez about his personal problems until receipt of the October 3, 1996, letter. Since this letter was given to Bisgard's supervisor after the R8-3-3 meeting notice was received by Gomez, Bisgard gave little weight to it. Bisgard learned from Rivera that the excuses given by Gomez from July to October, 1996, for his absences from work did not include concern for his daughter's health.
- 18. Bisgard believed that Gomez was provided numerous opportunities to improve his job performance. Despite his long years of employment with the state, Bisgard concluded that he failed to improve his job performance and that he should be terminated from employment with AHEC effective October 31, 1996.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the

acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. <u>Charnes v. Lobato</u>, 743 P.2d 27 (Colo. 1987); <u>Barrett v. University of Colorado Health Science Center</u>, 851 P.2d 258 (Colo. App. 1993).

Respondent contends that it sustained its burden to establish that complainant engaged in the acts for which discipline was imposed, that the conduct proven to have occurred violated State Personnel Board rules, and the decision to terminate complainant's employment was neither arbitrary, capricious nor contrary to rule or law.

Complainant contends that he was employed by AHEC for 20 years. He maintains that consideration should have been given to his long employment history and the family problems that he was having beginning in the summer of 1996. Complainant contends that it was arbitrary and capricious to terminate his employment when he brought his personal problems to the attention of his employer in August and October, 1996.

Having had the opportunity to hear the witnesses' testimony and observe their demeanor, the administrative law judge determined that complainant and his witness, his spouse, were not credible. Their testimony at hearing was not given any weight.

The evidence established that complainant abused his leave privileges. This conduct was proven to violate State Personnel Board Rules and created a hardship for respondent. The evidence further established that termination of complainant's employment was neither arbitrary, capricious nor contrary to rule or law in light of complainant's employment history and the serious nature of his conduct from July to October, 1996.

Complainant's contention that he was treated differently than other similarly situated employees was considered and deemed to be without merit. Complainant presented no evidence that respondent's decision to terminate his employment was motivated by any impermissible bias.

Neither party has sought, nor are they entitled to, an award of attorney fees and costs.

CONCLUSIONS OF LAW

- 1. Respondent established by preponderant evidence that complainant engaged in the conduct for which discipline was imposed.
- 2. The evidence established that complainant's conduct constituted a failure to comply with standards of efficient service and competence and a failure and inability to perform assigned duties in violation of State Personnel Board rules.
- 3. The decision to terminate complainant's employment was neither arbitrary, capricious nor contrary to rule or law.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this ____ day of April, 1997, at Denver, Colorado.

Margot W. Jones Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 <u>et seq</u>., 4 Code of Colo. Reg. 801-1. written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar

days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of April, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Joe L. Martinez, Jr. Attorney at Law 2009 Wadsworth Blvd., Suite 200 Lakewood, CO 80215

and in the interagency mail, addressed as follows:

Laurence Pendleton
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203